OF THI	E STATE OF WASHINGTON
)	
)	No. 62732-5-I
)	DIVISION ONE
)	
)	UNPUBLISHED OPINION
) )	FILED: July 19, 2010
	) ) ) ) ) ) )

Becker, J. — In December 2006, an informant purchased two counterfeit \$100 bills and methamphetamine from Joshua Mills. Mills was arrested as he drove away from the informant's apartment. Police searched him and the passenger compartment of his car and then impounded the car to search the trunk pursuant to a warrant. A jury convicted Mills on charges related to drugs, weapons, forgery, and identity theft. On appeal, Mills argues that the search violated his privacy rights under article I, section 7. Because there was a nexus between Mills, his arrest for crimes based on the methamphetamine delivery and the counterfeit bills, and the warrantless search of the passenger compartment of his car for evidence of those crimes, we conclude that his constitutional rights were not violated by the warrantless search. And the trial court did not err by

admitting evidence challenged by Mills or by denying his severance motion. We affirm his conviction.

## **FACTS**

The State charged Mills by amended information with unlawful possession of a firearm, delivery of methamphetamine, two counts of second degree identity theft, and two counts of possession of stolen property in the second degree.

Mills moved to suppress the evidence on the grounds that police acted on information from an unreliable informant and that the stop of his vehicle was pretextual. He did not argue that the search incident to arrest was unlawful.

The trial court denied Mills' motion, finding the informant reliable and the stop not pretextual. The trial court entered written findings of fact and conclusions of law after Mills filed his notice of appeal.

Before trial, Mills also moved to sever the charges of unlawful possession of a firearm and delivery of methamphetamine from the charges of identity theft and possession of stolen property. The trial court denied the motion, ruling that joinder was not unduly prejudicial and promoted judicial economy. The trial court also agreed to exclude as irrelevant any evidence or reference to counterfeiting as an uncharged bad act. In response, the State moved to amend the information to add one count of forgery of United States currency, making relevant the testimony about the counterfeit bills. The trial court granted the amendment over Mills' objection and denied Mills' motion to sever the forgery

charge. The trial court also denied Mills' renewed severance motion at the conclusion of the evidentiary portion of the jury trial. The jury returned guilty verdicts on all seven counts. Mills appeals.

## SUPPRESSION

On December 28, 2006, a state patrol unit stopped Mills as he drove away from the scene of a controlled buy in a Cadillac. The stop was ordered by Auburn Police Department detectives who had been listening in a back room while Mills sold methamphetamines and counterfeit money to an informant in the informant's apartment. After arresting Mills, police searched his person and the passenger compartment of his car. The trial court found that he was lawfully arrested for delivering methamphetamines and counterfeit money.

A jury found Mills guilty on all counts on October 16, 2008. On April 21, 2009, the United States Supreme Court decided Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), which set forth the circumstances in which police may, under the Fourth Amendment, conduct a warrantless search of a vehicle incident to an arrest. On October 22, 2009, the Washington Supreme Court decided State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009), which held that under article I, section 7 of the Washington Constitution, the search incident to arrest exception "requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest." Patton, 167 Wn.2d at 384.

Mills argues that the postarrest search of his car violated his right to privacy guaranteed by article I, section 7 of the Washington Constitution.

Patton applies retroactively here because Mills' conviction is not yet final. Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (By "final," the Supreme Court means a case in which "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."). No "nexus" existed in Patton because Patton was not a driver or recent occupant of the vehicle searched. No officer safety concerns were implicated by his brief prearrest proximity to the car when he was secured in the back of a patrol car during the search. And there was no basis to believe evidence relating to Patton's arrest on a warrant for failure to appear would have been found in the car. See Patton, 167 Wn.2d at 395-96.

Patton was followed by State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), where police arrested the driver on an outstanding warrant and searched his car while he was handcuffed and secured in the back of a police car. The search was held to violate article I, section 7 because it "was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed." Valdez, 167 Wn.2d at 778.

This court recently considered the application of article 1, section 7 in

State v. Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010). There, a police officer stopped Wright for a traffic infraction and smelled the strong odor of marijuana emanating from the car, observed Wright's furtive behavior, and saw a large roll of money in the glove box. The officer arrested Wright for possession of marijuana, handcuffed him, and placed him in the back of a patrol car. Wright admitted that he had smoked marijuana earlier in the day. A K-9 unit alerted to the presence of drugs and police searched Wright's car. Wright moved unsuccessfully to suppress the evidence, although not on the basis that the search incident to arrest was unconstitutional.

On appeal, Wright argued that the search violated the Fourth Amendment and article I, section 7 of the Washington Constitution. Wright distinguished the case before it from the typical automobile search involved in Patton and Valdez, where "a search after a traffic stop leads to the fortuitous discovery of evidence of an unrelated crime." Wright, 155 Wn. App. at 555. The Wright court determined that the officer had the authority to arrest Wright on probable cause to believe he had committed a drug crime. The facts of Wright's arrest provided the necessary nexus between Wright, his arrest for a drug crime, and the search of his vehicle. Wright, 155 Wn. App. at 553, 556. "Because the police had probable cause to arrest Wright for possession of marijuana and to search the car for evidence of the drug crime, the search of the passenger compartment of the car incident to arrest did not violate article I, section 7." Wright, 155 Wn.

App. at 556.

Following Wright, we conclude that the warrantless search of Mills' vehicle did not violate article I, section 7, even assuming Mills was fully secured at the time the search took place. The trial court found that Trooper Grant Slish had probable cause to arrest Mills. The record supports that conclusion. Trooper Slish testified at the suppression hearing that he arrested Mills "for selling methamphetamine." Trooper Slish also knew that police were planning on buying counterfeit bills from Mills, and he learned through the radio that the buy had been successful before stopping Mills. In addition, the police had probable cause to believe that evidence related to the methamphetamine delivery and sale of counterfeit bills would be found in Mills' Cadillac. The confidential informant, who was found to be reliable by the trial court, told police that he paid Mills for the illicit items using the prerecorded buy money and that he escorted Mills to the Cadillac after their transaction. Trooper Slish pulled Mills over within a few minutes after undercover detectives watched Mills leave the apartment complex in the Cadillac.

Like the officer in <u>Wright</u>, and unlike the officers in <u>Patton</u> and <u>Valdez</u>, the police here were not conducting a "fishing expedition" for evidence of a crime unrelated to the crimes for which Mills was arrested. <u>See Wright</u>, 155 Wn. App. at 555. Because the facts of this case show the necessary nexus between Mills, his arrest for methamphetamine delivery and forgery, and the warrantless search

of his car for evidence of those crimes, we hold that the search of the passenger compartment of Mills' car did not violate article I, section 7.

In view of our conclusion that the search was valid, we do not reach the State's other arguments, at least one of which has been foreclosed by <u>State v. Afana</u>, No. 82600-5 (Wash. July 1, 2010).

## ER 404(b)

During the search of Mills' person, officers found a genuine \$100 bill bearing the same serial number as the counterfeit bills he sold to the informant and a key ring with a fob credit card bearing Mills' name. During the search of Mills' car, officers found:

- Two identification cards, a pay stub, a debit card, and a checkbook all bearing the name "Marvin Dibley," evidence which formed the basis for charging Mills with one count of second degree possession of stolen property and one count of second degree identity theft.
- Two driver licenses bearing the name "Karen Dole," a social security card under the name "Karen Gilbert," Dole's maiden name, a savings bond bearing the name of "Brittany Dole" in care of "Karen Dole," evidence which formed the basis for charging Mills with one count of second degree identity theft.
- A checkbook in the name of "Ethan Kayler," evidence which formed the basis for charging Mills with possession of stolen property in the second degree.
- A vehicle title signed one day earlier by "Clarence Fannin" and purportedly notarized by an individual who misspelled "County of Pierce."
- An improperly filled-out trip permit under Mills' name.
- A money order where the name "Joshua Mills" had been added over the obscured name of the payee.
- A paystub from "Raymond Lapointe."
- Two paystubs and a prescription card under the name "Mark

Simpson."

Nine generic gift cards.<sup>1</sup>

Mills stipulated that Kayler, Dibley, and Dole did not know him or give him permission to possess their property.

During the search of Mills' trunk pursuant to a warrant, officers found a red duffel bag containing an identification card in Mills' name; a blue folder with sheets of "scrape off" printed credit card numbers, expiration dates, and Joshua Mills' name; and a .357 revolver under the carpet in the trunk.<sup>2</sup> With respect to the revolver, Mills stipulated that he had a prior conviction for a serious offense. Police officers also found receipts for purchases made with the key fob credit card found on Mills at the time of his arrest and clothes with store tags that corresponded with one of the receipts when they re-searched the passenger compartment.

Mills argues that the trial court erred under ER 404(b) by failing to exclude evidence unrelated to the charges, including the key fob credit card; items purchased with that card; gift cards; the so-called "fraud" folder with "scrape off" credit card numbers, expiration dates, and Mills' name; and the money order, pay stub, and prescription in another person's name. Specifically, Mills argues that the trial court failed to conduct an ER 404(b) analysis on the record and that the evidence was irrelevant propensity evidence.

<sup>&</sup>lt;sup>1</sup> Report of Proceedings (October 14, 2008-afternoon) at 22-40.

<sup>&</sup>lt;sup>2</sup> Report of Proceedings (October 14, 2008-morning) at 66-72, 93-94.

ER 404(b) states that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Admission of ER 404(b) evidence is reviewed for abuse of discretion. Thang, 145 Wn.2d at 642.

The State contends that Mills waived the issue on appeal by failing to object under ER 404(b) to the admission of evidence showing uncharged bad acts. At the pretrial stage, Mills' ER 404(b) objection focused on excluding evidence of counterfeit money, an objection the State cured by amending the information to add a forgery charge. But during trial, Mills also objected to the admission of additional evidence related to uncharged crimes, wrongs, and acts on the grounds that the evidence was not relevant under ER 404(b). For example, Mills objected to the admission of receipts related to the key fob credit card. In response to the objection, the trial court said it would allow Mills an opportunity to develop the objection outside of the presence of the jury. That

morning, the State presented testimony from the officer who searched Mills' car.

Mills renewed his objection when the State offered the key fob credit card and the folder of numbers. At the end of the testimony regarding the search, the trial court excused the jury and stated on the record:

The Court initially had a side bar with Counsel because Defense Counsel objected to these particular items being introduced into evidence as uncharged crimes and items that were really not related or relevant at all.

The Court overruled the objection after hearing from the State, and once the State indicated that these items all specifically went to intent in terms of this identity theft and how any of these items might have been used in order to commit a crime.

During the afternoon session, Mills objected to admission of the altered money order, gift cards, and pay stubs and prescription in another person's name. During a break in testimony, the trial court again put on the record a side bar related to the evidentiary objections. Based on this record of objections, we conclude that Mills preserved for appellate review the issue of whether the probative value of the evidence outweighed the prejudice.

The trial court did not err by overruling Mills' objections to the relevance of the challenged evidence. First, the key fob card was relevant to Mills' possession of the items in the Cadillac. Mills' primary defense to firearm and stolen property and identity theft charges was that he had been in possession of the Cadillac for only a short period of time and that the evidence found in the car was not his. The key fob credit card with the related receipts and clothing found in the car linked Mills to the car, making that evidence relevant to the possession

elements of the fraud and firearm charges. Evidence that Mills' name replaced the name of the original payee of a money order and that the money order was found in his car shows the degree to which Mills knew what was in the car. Additionally, the folder with sheets of numbers, expiration dates, and Mills' name was found, like the .357 revolver, in the trunk, which made it relevant to Mills' access to the trunk, knowledge of what the trunk area contained, and his theory that the gun could have been left behind by the car's previous owner.

The key fob credit card was also relevant to the methamphetamine and forgery charges. Mills told the informant about his new key fob credit card while he was selling the methamphetamine and counterfeit money. That the police found a key fob credit card on Mills' person shortly after the buy-bust operation was relevant to fortifying the informant's credibility, especially when Mills asserted in closing that the confidential informant to whom he sold the bills and drugs was not a reliable informant or a credible witness.

The challenged evidence was also relevant to the identity theft and stolen property charges. To convict Mills of identity theft, the State had to prove that Mills did "knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). To convict Mills of possessing stolen property, the State had to prove that Mills did knowingly "receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen

and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). Evidence of the altered money order went towards Mills' knowledge and ability to alter financial information, his knowledge that the financial information in his car belonged to another, and his intent to use financial information to commit a crime.

The folder with sheets of numbers, expiration dates, and Mills' name also went to Mills' knowledge of and ability to commit credit or debit card fraud and was relevant to show Mills' intended use of Dibley's debit card. Evidence that Mills possessed additional financial documents that did not belong to him was relevant to showing the absence of accident, making it less likely that he accidentally, mistakenly, or unknowingly possessed the financial information of another.

Mills argues and the State concedes that the trial court did not conduct an ER 404(b) analysis on the record. A trial court errs by not fully articulating its balancing process in admitting ER 404(b) evidence. State v. Carleton, 82 Wn. App. 680, 685-86, 919 P.2d 128 (1996). But that error is harmless where the record as a whole is sufficient to allow effective appellate review. Carleton, 82 Wn. App. at 686. Here, the record as a whole allows for effective review of the trial court's decision and supports the finding implicit in the trial court's decision to admit the evidence, which is that the relevance of the evidence outweighed its probative value. We conclude that the trial court did not abuse its discretion by

admitting the evidence.

## JOINDER

Mills argues that the trial court abused its discretion by failing to sever the prosecutions for firearm and drug violations from the prosecutions for identity theft and stolen property and the prosecution for forgery from all other prosecutions. CrR 4.3(a) permits two or more offenses to be joined in a single charging document when the offenses: "(1) Are of the same or similar character, even if not part of a single scheme or plan; or (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." "Offenses properly joined under CrR 4.3(a), however, may be severed if 'the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." State v.

Bythrow, 114 Wn.2d 713, 717, 790 P.2d 154 (1990), quoting CrR 4.4(b).

A defendant seeking severance bears the burden of demonstrating that a trial on multiple counts "would be so manifestly prejudicial as to outweigh the concern for judicial economy." Bythrow, 114 Wn.2d at 718. "In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994),

cert. denied, 514 U.S. 1129 (1995). The trial court's refusal to "sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion." Bythrow, 114 Wn.2d at 717.

On the strength of the evidence factor, Mills contends that the trial court erred by failing to consider the disparity between the buy-bust evidence linking him to forgery and methamphetamine delivery and the evidence found in his car supporting identity theft and possession of stolen property. But the record shows that the trial court did consider the strength of the evidence factor. Mills alerted the trial court to the alleged disparity in evidence during argument on his motion to sever. The State countered that "having a whole bunch of stolen stuff in your car is pretty good evidence that it was stolen, and pretty good evidence that you were not intending to do anything honest with them." The alleged disparity was also briefed. In response, the trial court stated, "So I have to ask myself, is this unduly prejudicial, and is it actual prejudice in fact, balanced by all the other matters that we have discussed, one of them being judicial economy."

Additionally, the record does not show that Mills was unduly prejudiced by a decision to join a weak charge with a stronger one. Here, the evidence related to the methamphetamine and forgery counts consisted of the informant's testimony, the counterfeit currency, the methamphetamine, and the stipulated lab report. The firearm charge was established by Mills' assertion of ownership

<sup>&</sup>lt;sup>3</sup> Report of Proceedings (October 9, 2008) at 6-9.

<sup>&</sup>lt;sup>4</sup> Report of Proceedings (October 9, 2008) at 11.

of the Cadillac, access to the trunk, items in the trunk that linked him to the trunk, and the stipulation that he had a prior conviction for a serious crime. The evidence of the crimes for possession of stolen property and identity theft consisted of debit cards, checkbooks, and social security numbers and Mills' asserted ownership of the Cadillac. While the State did not present abundant evidence of Mills' intent to use the financial documents to commit a crime, the jury could have drawn a reasonable inference about intent from the evidence presented without turning to the evidence in support of the firearm, methamphetamine delivery or forgery charges.

Mills argues that trial court did not consider whether the clarity of his defenses to each count would suffer through joinder. "The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge." Russell, 125 Wn.2d at 64. The general themes of Mills' defenses were that he did not know about or have possession of the gun or the stolen financial information, he did not have any intent to commit crimes with the financial information, and the confidential informant was not reliable for the forgery and methamphetamine charges.

Although the defenses here were not identical, Mills does not explain how joining the counts would confuse the jury as to his defenses or how those defenses are inconsistent with each other.

As to the factor relating to the court's instructions, the court properly

instructed the jury that a "separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."

Finally, as to cross-admissibility, the evidence of the other crimes charged was mostly cross-admissible. Mills argues, however, that the evidence of his prior conviction for a serious offense necessary to prove unlawful possession of a firearm would not have otherwise been admissible at trial for any of the other charges. While that is true, the stipulation properly withheld from the jury additional evidence about the type of crime for which Mills was convicted, minimizing any prejudice related to propensity assumptions. Mills also argues that evidence of methamphetamine delivery, firearm possession, and forgery was unrelated to the identity theft and forgery counts. But it would have been impossible for the State to tell an unfragmented story about Mills' possession and control over the Cadillac and the evidence inside without introducing evidence that Mills had placed a red bag in the trunk, which required testimony from the informant who knew Mills placed the bag there because Mills had just sold him drugs and counterfeit money.

"The fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." State v. Kalakosky, 121 Wn.2d 525, 538, 852 P.2d 1064 (1993). "When evidence concerning the other crime is limited or not admissible, our

primary concern is whether the jury can reasonably be expected to compartmentalize the evidence so that evidence of one crime does not taint the jury's consideration of another crime." Bythrow, 114 Wn.2d at 721 (internal quotation marks omitted), quoting United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987). Here, the trial court could reasonably conclude that the jury would be able to compartmentalize the various counts.

Even if Mills had demonstrated undue prejudice from the joinder of the counts against him, he also had to demonstrate "that a joint trial would be so prejudicial as to outweigh the concern for judicial economy." State v. Philips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). If the charges had been severed into three jury trials, many of the same witnesses would have been required to testify in each trial in order to present substantially the same evidence. And three juries would have had to be impaneled. His proposal was not consistent with judicial economy. We hold that the trial court did not abuse its discretion by holding a joint trial.

Affirmed.

WE CONCUR:

Becker,

applivisk J Elector, J